Supreme Court of the United States

October Term, 1976

No. 76-1313

KENNETH LEROY HOWARD,

Appellant,

vs.

~~THE PEOPLE OF THE STATE OF~~ CALIFORNIA,

Appellee.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOR THE SECOND APPELLATE DISTRICT

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Petitioner prays for a Writ of Certiorari to review the judgment of the Court of Appeal of the State of California for the Second Appellate District affirming his conviction for the crime of possession of a firearm by a felon. This case presents substantial federal constitutional questons and is within the

jurisdiction of the Supreme Court of the United States.

OPINIONS BELOW

The first of two opinions by the Court of Appeal was filed September 22, 1976 and is unreported except in the advance sheets at 62 Cal. App. 3d 157. The second opinion, filed October 29, 1976 after rehearing, attached hereto as Appendix "A," is reported at 63 Cal. App. 3d 249. The denial by the California Supreme Court of appellant's Petition for Hearing (Appendix "B") is reported at 18 Cal. 3d, Minutes, at 7.

JURISDICTION

The judgment of the Court of Appeal was entered on October 29, 1976. A timely Petition for Hearing was denied by the California Supreme Court on December 22, 1976. This petition is timely filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Is California Penal Code section 12021 (which prohibits the possession of a firearm by a felon) unconstitutional on its face or as applied, as a deprivation of liberty and property without due process of law, where no provisions are made for notice to the owner of a firearm who, after lawful possession, is thereafter convicted of a felony?

2. May a criminal defendant, consistent with the

Due Process Clause, be punished for a crime of possession of a firearm by a felon when he did not know that he was a felon when he possessed that firearm?

3. Where a police officer seizes a firearm without knowledge of any facts which support the belief that the possession of the firearm is a crime, does that seizure violate the Fourth Amendment?

4. May a consent to search a person's home be upheld where that consent is preceded by police subterfuge and coercion?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . . "

United States Constitution, Amendment V:

> "No person shall . . . be deprived of . . . liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

California Penal Code, section 12021:

> "(a) Any person who has been convicted of a felony under the laws of the United States, of the State of California, or any other state, government, or country . . . who owns or has in his possession or under his custody or control any pistol, revolver, or other firearm capable of being concealed upon the person is guilty of a public offense . . . . "

STATEMENT OF THE CASE

Officer Roy Neie of the Los Angeles Police Department was told by an informant that a male Negro by the name of Howard was selling heroin from apartment 213 at 400 South Kingsley Avenue in Los Angeles and that Howard was using the apartment as a narcotics "shooting gallery" (C.T. 6)[1]. The informant's information was not based on his own personal knowledge (R.T. 9).

Officer Neie, accompanied by other officers, went to 400 South Kingsley Avenue. They were dressed in plain clothes and had neither a search warrant nor an arrest warrant. Finding the premises to be a locked security building, the officers entered by following someone through the locked front door. They did not have permission to enter (C.T. 17 - 18). Ordinarily, a person seeking entry must contact one of the building's occupants via an intercom and wait for an electronic buzzer to open the door (C.T. 25).

The officers went to apartment 213 and knocked on the door. The door was opened by Kenneth Howard, and the officers identified themselves and asked if they could come in (C.T. 7 - 8). Howard told the officers who he was and, according to Officer Neie, consented to a search of the

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[1] Page citations preceded by "C.T." refer to the Clerk's Transcript on Appeal; those preceded by "R.T." refer to the Reporter's Transcript on Appeal.

apartment (C.T. 10). A rifle and .38 calibre revolver were found in one of the bedrooms and were seized. Howard did not consent to the seizure (C.T. 16).

The reason that the guns were seized was to determine whether or not they were stolen. Officer Neie had no information about the guns at the time of their seizure (R.T. 20).

When shown the gun by Neie, Howard said, "That's my gun. I bought it approximately four years ago" (C.T. 14). At trial, Howard testified that he had purchased the gun at a sporting goods store in 1972 and that it was registered to him (R.T. 39). He admitted that he had been convicted for a violation of California Health and Safety Code section 11500.5 (possession of heroin for sale–now section 11351) in September, 1974, and that he served 120 days in the county jail, plus four months at a Department of Corrections facility at Chino, California for "observation" (R.T. 40).

Howard testified that the officers immediately walked into the apartment when he opened the door and asked him if they could search. Since they were already inside, he said, "You might just as well" (C.T. 25). Howard was not living at 400 South Kingsley on the date of his arrest. His son was living there and Howard was using the apartment as his mailing address (R.T. 41 - 42).

THE QUESTIONS ARE SUBSTANTIAL

1. **California Penal Code section 12021 is unconstitutional on its face or as applied, as a deprivation of liberty and property without due process of law,**

because it contains no provisions for notice to the owner of a firearm that he may no longer lawfully possess that firearm when he has been convicted of a felony.

Penal Code section 12021 is not limited to the acquisition of firearms, but prevents possession of them by felons. Thus, when a person who owns a firearm is convicted of a felony, he falls within the ambit of the section without doing any affirmative act. He is not told that he must dispose of any firearms in his possession or given any other notice of the effect of his newly acquired status as a felon. He is not afforded the notice required by the Due Process Clause prior to the loss of liberty that he faces because of his change in status.

In other, less critical situations, this Court has held that due process must be afforded to persons whose rights are affected by governmental action. Due process rights protect persons from the garnishment of their bank accounts (*North Georgia Finishing Inc. v. Di-Chem*, 419 U.S. 601 (1975)), seizure of their refrigerators (*Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974)), from the revocation of parole (*Morrissey v. Brewer*, 408 U.S. 471 (1972)), and the cancellation of welfare benefits (*Goldberg v. Kelly*, 397 U.S. 254 (1970)).

Here, where a person's liberty is at stake, no less can be called for than that which is afforded a person whose refrigerator is in jeopardy: notice must be a prerequisite to the taking. Absent notice, a person in Mr. Howard's position is no more culpable than a person whose only act is to move to a particular city. See *Lambert v. California*,

355 U.S. 255 (1958). Given that Howard did no act after his felony conviction other than to continue to "possess" in a most technical sense a gun that was already his, section 12021 cannot apply to him without violating the Due Process Clause.

2. The Due Process Clause prevents appellant's conviction, for there was no showing that he had knowledge of the facts necessary to make him guilty of the crime charged.

While a state penal law may in certain circumstances do away with the requirement of intent (see *United States v. Freed*, 401 U.S. 601 (1971); *Holdridge v. United States*, 282 F.2d 302, 310 (8th Cir. 1960)), the general rule is that a showing of intent, or *mens rea*, is required as to the elements of a crime. The *mens rea* requirement

> " . . . is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."
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> *Morrissette v. United States*, 342 U.S. 246, 250 (1952).[2]

Here, as in *Morrissette*, the Court is faced with a statute which does not, on its face, require *mens rea*. As in *Morrissette*, though, intent should be read into the statute,

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[2]See also Model Penal Code § 2.05 (Tent. Draft No. 4, 1955); G. WILLIAMS, CRIMINAL LAW §§ 70 - 76 (1953); Hart, *The Aims of Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 422 - 25 (1958); Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 56 (1933).

for had the facts been as he thought them to be, appellant would have committed no crime.

> "[I]f a person is ignorant of or mistaken about a matter of fact or law and the ignorance or mistake negates the kind of culpability required for the commission of the offense, he does not commit the offense even if his conduct would have constituted the offense had his information been correct."
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> *Working Papers of the National Commission on Reform of the Federal Criminal Laws* 135 (1970); see Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 108 - 09.

There was nothing inherently wrong, nothing criminal or evil about appellant's ownership of a revolver, and nothing to alert him to the possibility that his act might be a crime. Compare *United States v. Freed, supra*, and *United States v. Dotterweich*, 320 U.S. 277 (1943), with *Lambert v. California, supra*, and *Morrissette v. United States, supra*.

Unlike the defendant in *United States v. Freed*, appellant was not involved with hand grenades or other unusual weapons. See *United States v. Freed, supra*, 401 U.S. at 616 (Brennan, J., concurring). Rather, he merely possessed a revolver which he had lawfully purchased and possessed prior to his felony conviction. Given that he did not know that he had been convicted of a felony, that, had the facts been as he thought them to be he would have committed no crime, appellant's conviction cannot be upheld. See California Penal Code § 17 (West 1965) (felony defined).

The trial court's refusal to recognize the need for *some*

proof of *mens rea,* its belief that section 12021 is a strict liability offense, requires reversal of appellant's conviction. See *People v. Bray,* 52 Cal. App. 3d 494, 498-99 (1976) (mistaké of fact as to felon status is a defense to a 12021 prosecution).

This Court's recent decision in *United States v. Park,* ..... U.S. ....., 95 S. Ct. 1903 (1975), seems to indicate that –*United States v. Dotterweich* notwithstanding–the Constitution requires that a defendant be at least negligent in order to be convicted of a crime, that *some mens rea* need be shown in every case. *United States v. Park, supra,* 95 S. Ct. at 1912 ("highest standard of foresight and vigilance" is required by Act); Tushnet, *Constitutional Limitation of Substantive Criminal Law,* 55 B. U. L. REV. 775, 795 (1975).

In his noted article on *mens rea,* Professor Packer states that, because of the stigma and possible loss of liberty inherent in the criminal process,

> "[n]o one should be sentenced to imprisonment or its equivalent without being afforded the opportunity to litigate the issue of *mens rea* . . . . "
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It has been suggested that this Court's two recent decisions on the subject, in *Park* and in *Mullaney v. Wilbur,* ..... U.S. ....., 95 S. Ct. 1881 (1975), indicate that the Court has adopted Professor Packer's suggestion. Tushnet, *supra,* 55 B. U. L. REV. at 800. Thus, where there is a substantial possibility of imprisonment, the Due Process Clause, or something (*Robinson v. California,* 370 U.S. 660 (1962)), requires proof of *mens rea;* it must at least be shown that the defendant acted negligently. See *United States v. Renner,*

496 F.2d 922 (6th Cir. 1974).

3. The seizure of the revolver by Officer Neie violated the Fourth and Fourteenth Amendments to the United States Constitution, for he had no facts at the time of the seizure to support a conclusion that the revolver was evidence of a crime.

When a police officer, in the course of an otherwise lawful search, comes upon contraband or evidence of a crime, he may seize that contraband or evidence. *Warden v. Hayden,* 387 U.S. 294, 307 (1967); *Harris v. United States,* 331 U.S. 145, 155 (1947). However, even when armed with a search warrant, an officer cannot seize things which he believes to be evidence without probable cause to entertain that belief. *Stanley v. Georgia,* 394 U.S. 557, 570 (1969) (Stewart, J., concurring); see *Marron v. United States,* 275 U.S. 192, 196 (1927).

There must be a connection between the evidence seized and a particular crime in order for an officer to seize evidence which is not contraband.

> " . . . [I]n the case of 'mere evidence,' probable cause must be examined in terms of cause to believe that the evidence sought will aid in a *particular* apprehension or conviction."
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> *Warden v. Hayden, supra,* 387 U.S. at 307 (emphasis added).

See also *United States v. Baldwin,* 46 F.R.D. 63 (S.D. N.Y. 1969).

The officer must be "aware of some specific and

articulable fact from which a rational link between the item seized and criminal behavior can be inferred." *People v. Hill,* 12 Cal. 3d 731, 763 (1974).[3]

Here, the officers were aware of no facts from which they could infer that the guns in apartment 213 were evidence of a crime. According to Officer Neie, he seized the revolver "[f]or checking out purposes, to find out if it was stolen." He had no information concerning that particular gun, no indication that it might be stolen. His only "basis" for the seizure was that in his experience as a police officer he had often encountered stolen guns (C.T. 20).

Officer Neie was aware of no crime involving stolen guns for which he was seizing evidence. He had not been informed that there was a likelihood that appellant would be armed or would be in the possession of stolen guns. There was no "nexus" between the guns and any crime nor any hypothesis based upon facts known to the officer at the time of the seizure which could support that seizure. What Officer Neie did was to seize a gun on the chance that he might later discover whether it was evidence of a crime. The fact that he later did discover facts which showed that the gun was evidence of a crime cannot legitimize the seizure and the gun should have been suppressed.

4. The search conducted by the Los Angeles Police Officers which led to appellant's prosecution was unlawful, for there was no valid consent to search

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[3]The instant case is quite like *Hill.* There, tape recordings were seized on the ground that they "might reveal something." *People v. Hill, supra,* 12 Cal. 3d at 763. Here, the gun was seized "for checking out purposes." (C.T. 20.)

given to them.

> "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given."
>
> *Bumper v. North Carolina,* 391 U.S. 543, 548 (1968).[4]

In order to determine whether the prosecutor has met his burden, the court must look to "the totality of all the circumstances" surrounding the consent. *Schnecloth v. Bustamonte,* 412 U.S. 218, 227 (1973).

One of the factors to be considered in determining the voluntariness of a consent to search is whether the person who consented to the search was informed that he had a right to refuse to consent. *Schnecloth v. Bustamonte, supra.* Another, it is submitted, is the degree of intrusion by the police upon the privacy of the consenting person prior to the consent (*People v . Haven,* 59 Cal. 2d 713 (1963) [illegal entry by police officers vitiates a consent which follows that entry]; see *Katz v. United States,* 389 U.S. 347 (1967); *United States v. Watson,* ..... U.S. ..... , 96 S. Ct. 820, 832 (1976) (Stewart, J., concurring)), for a consent given by a person who is in his home is a far different thing than one given by a person who is standing beside a highway. The officers seeking to obtain the consent are already intruding on

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[4]Absent a proper consent, in all but a few carefully defined situations, a warrantless search of a person's home is unreasonable. *Camara v. Municipal Court,* 387 U.S. 523, 528 - 29 (1967).

a normally private area and their "request" to search is both less resistable and, seemingly, less of a concession.

The consent to search obtained by Officer Neie cannot, when one views the totality of the circumstances surrounding it, be deemed voluntary. The officers whose entry and search of apartment 213 were consented to had already intruded upon an area not open to the public by following a person who had a building key into the building. They had no permission to enter that building or to approach the door to apartment 213.

The officers were on their way into apartment 213 when Howard consented to their entry, because "they was in the doorway and were coming in anyways . . . . So I had no way to stop them" (C.T. 25). They did not tell Howard that he had a right to refuse to consent to a search and, by their conduct, indicated that he could not.

When one views the totality of the circumstances and considers the behavior of the officers, only one conclusion can be reached: that the consent to search given by appellant Howard was not voluntary and that the ensuing search of apartment 213 was unlawful.

CONCLUSION

It is submitted that this case presents substantial questions regarding due process and the right to privacy. The questions presented here merit a full review before this Court.

Respectfully submitted,

BURTON MARKS and

STEPHEN GILBERT

Attorneys for Appellant

INDEX TO APPENDIXES

APPENDIX "A"

OPINION OF THE COURT OF APPEAL
SECOND APPELLATE DISTRICT
STATE OF CALIFORNIA

CERTIFIED FOR PUBLICATION

In the Court of Appeal of the State of California,
Second Appellate District, Division Three.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent, v. KENNETH LEROY HOWARD,
Defendant and Appellant.

2D CRIM. NO. 28221 - Sup. Ct. No. A-316527

[FILED OCTOBER 29, 1976]

ON REHEARING APPEAL from a Judgment of the Superior Court of Los Angeles County. Sam Bubrick, Judge. Affirmed.

Burton Marks and Jonathan K. Golden for Defendant and Appellant.

Evelle J. Younger, Attorney General, Jack R. Winkler, Chief Assistant Attorney General, S. Clark Moore, Assistant Attorney General, Howard J. Schwab and Alexander W. Kirkpatrick, Deputy Attorneys General, for Plaintiff and Respondent.

Kenneth Leroy Howard appeals from a judgment of conviction of possession of a concealable firearm by a

convicted felon. (Pen. Code, § 12021.) The appeal lies. (Pen. Code, § 1237, subd. (1).)

Appellant Howard contends that: (1) the police violated his constitutional rights when they illegally entered his apartment building through a locked security entrance; (2) they searched his apartment without his consent; and (3) they seized the guns they found in his apartment unconstitutionally. Each of these contentions is without merit.

Appellant's remaining arguments concern Penal Code section 12021. He urges that the section requires knowledge on the part of the convicted felon of his status and of the prohibition against possession of a firearm and that no proof of such knowledge was introduced at his trial. Alternatively, appellant argues that Penal Code section 12021 is unconstitutional if it is interpreted not to require such knowledge on the part of a defendant-felon. Both of these arguments also lack merit. We will therefore affirm the judgment of conviction.

STATEMENT OF FACTS[1]

On the afternoon of March 17, 1975, Los Angeles police officers went to an apartment building on Kingsley Avenue to investigate tips received from two informers that a black male by the name of Howard was selling heroin and using a certain apartment as a "shooting gallery."

Admission to the hallways of this building could be gained only through a locked door opened by key or buzzer

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[1]We construe all facts in the light most favorable to the People as the prevailing party below. (*People v. Vann*, 12 Cal. 3d 220, 225.)

activated by someone in an apartment. The officers did not use a key or seek a buzzer signal from any occupant. Instead, they simply entered the building at the same time someone else opened the door thereof. One of the officers, however, testified that the managers of many security buildings in the area, including appellant's building, had given the police keys to the outside doors.

The officers went immediately to appellant's apartment, identified themselves and their purpose, and asked to come inside. Appellant replied, "Come on in." Once inside, the officers asked for and received appellant's permission to search the apartment.

The search revealed marijuana, a rifle, and a Colt revolver. All of these items were seized. One of the officers testified that although he had no particular suspicion that the guns were stolen, it had been his experience in narcotics investigations that guns discovered in the course of such investigations frequently turned out to have been stolen.

Testifying in his own defense, appellant stated that he had not given permission to the police to search the apartment. He also stated that while police were interrogating him, his girl friend entered the apartment and told police that she owned the marijuana. Appellant admitted that he was the registered owner of both firearms, but claimed to have no knowledge that they were at the Kingsley apartment. He had purchased them before he was arrested and convicted of a felony and said he had no knowledge that he was thereafter prohibited from owning them.

DISCUSSION

I Appellant's Constitutional Rights Were Not Violated By Police Entry Through The Outside Apartment Security Entrance.

In *People v. Seals,* 263 Cal. App. 2d 575, 577, this statewide court held that officers can constitutionally enter apartment hallways and other common areas without a warrant or express permission from particular tenants. In the present case, however, officers gained entry to the hallway through a locked door. Appellant argues that in doing so the police committed a trespass in violation of his constitutional rights of privacy and freedom from unreasonable search and seizure.

For several reasons, however, we are convinced that under the facts of this case no constitutional violations occurred. First, one of the officers testified that the building's manager had given him a key to the outside door. Even though the key was not used on this particular occasion, its possession by the officers was unrebutted evidence that the police had the manager's permission to enter in the course of their duties. Appellant cannot presume to control the right of other tenants, or particularly the manager as the owner's agent, to authorize entry to the building's common areas by nontenants. (See *People v. Cruz,* 61 Cal.2d 861, 866-867; *People v. Egan,* 250 Cal. App. 2d 433, 436; *cf. People v. Baker,* 12 Cal. App. 3d 826, 836.)

Second, we do not believe that the locked outside door established the same sanctity for the hallways and common areas as is established for individual apartments by the doors

to those apartments. An outside security door is designed to prevent persons roaming through the apartment buildings for solicitation or perhaps criminal purposes. But no constitutional infringement of privacy occurs when an officer enters a building through the outside security door and goes immediately to an apartment where he has business with a particular tenant. (*United States v. St. Clair* (S.D. N.Y. 1965) 240 F.Supp. 338, 340.)[2] Even the tenant to be visited can easily avoid the visitor by not answering the door.

Finally, we note that even if the initial entry by the officers were trespassory, it would not invalidate the subsequent search of appellant's apartment because, as we will discuss below, consent therefor was freely given by appellant. His opportunity to make an intelligent decision as to whether he would consent to the search was in no way impaired by the fact that the officers first made contact with him by knocking on his apartment door rather than by buzzing him at the outside entrance. (*Cf. People v. Haven,* 59 Cal. 2d 713, 718 (sudden confrontation by officers who had illegally entered defendant's house vitiated consent to search); *People v. Lawler,* 9 Cal. 3d 156, 164 (consent obtained following illegal search held invalid).) A simple trespass alone will not invalidate a subsequent search which is otherwise proper. (*People v. Terry, supra,* 70 Cal. 2d at 427; *People v. Medina,*

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[2]The *St. Clair* case involved precisely the type of apartment security entrance involved in the instant case. Although apparently no California case has dealt with the identical question, our Supreme Court has cited the *St. Clair* decision for the general proposition that police officers may constitutionally enter common hallways of apartment buildings without a warrant or express permission. (See *People v. Terry,* 70 Cal. 2d 410, 427.) For a thorough discussion of other federal and state court decisions in conformity with *St. Clair,* see *People v. Seals, supra,* 263 Cal. App. 2d at 578 - 579.)

355 U.S. 255 (1958). Given that Howard did no act after his felony conviction other than to continue to "possess" in a most technical sense a gun that was already his, section 12021 cannot apply to him without violating the Due Process Clause.

2. The Due Process Clause prevents appellant's conviction, for there was no showing that he had knowledge of the facts necessary to make him guilty of the crime charged.

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for had the facts been as he thought them to be, appellant would have committed no crime.

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Unlike the defendant in *United States v. Freed*, appellant was not involved with hand grenades or other unusual weapons. See *United States v. Freed, supra*, 401 U.S. at 616 (Brennan, J., concurring). Rather, he merely possessed a revolver which he had lawfully purchased and possessed prior to his felony conviction. Given that he did not know that he had been convicted of a felony, that, had the facts been as he thought them to be he would have committed no crime, appellant's conviction cannot be upheld. See California Penal Code § 17 (West 1965) (felony defined).

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See also *United States v. Baldwin,* 46 F.R.D. 63 (S.D. N.Y. 1969).

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articulable fact from which a rational link between the item seized and criminal behavior can be inferred." *People v. Hill,* 12 Cal. 3d 731, 763 (1974).[3]

Here, the officers were aware of no facts from which they could infer that the guns in apartment 213 were evidence of a crime. According to Officer Neie, he seized the revolver "[f] or checking out purposes, to find out if it was stolen." He had no information concerning that particular gun, no indication that it might be stolen. His only "basis" for the seizure was that in his experience as a police officer he had often encountered stolen guns (C.T. 20).

Officer Neie was aware of no crime involving stolen guns for which he was seizing evidence. He had not been informed that there was a likelihood that appellant would be armed or would be in the possession of stolen guns. There was no "nexus" between the guns and any crime nor any hypothesis based upon facts known to the officer at the time of the seizure which could support that seizure. What Officer Neie did was to seize a gun on the chance that he might later discover whether it was evidence of a crime. The fact that he later did discover facts which showed that the gun was evidence of a crime cannot legitimize the seizure and the gun should have been suppressed.

4. The search conducted by the Los Angeles Police Officers which led to appellant's prosecution was unlawful, for there was no valid consent to search

[3]The instant case is quite like *Hill.* There, tape recordings were seized on the ground that they "might reveal something." *People v. Hill, supra,* 12 Cal. 3d at 763. Here, the gun was seized "for checking out purposes." (C.T. 20.)

given to them.

> "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given."
>
> *Bumper v. North Carolina,* 391 U.S. 543, 548 (1968).[4]

In order to determine whether the prosecutor has met his burden, the court must look to "the totality of all the circumstances" surrounding the consent. *Schnecloth v. Bustamonte,* 412 U.S. 218, 227 (1973).

One of the factors to be considered in determining the voluntariness of a consent to search is whether the person who consented to the search was informed that he had a right to refuse to consent. *Schnecloth v. Bustamonte, supra.* Another, it is submitted, is the degree of intrusion by the police upon the privacy of the consenting person prior to the consent (*People v. Haven,* 59 Cal. 2d 713 (1963) [illegal entry by police officers vitiates a consent which follows that entry]; see *Katz v. United States,* 389 U.S. 347 (1967); *United States v. Watson,* ..... U.S. ..... , 96 S. Ct. 820, 832 (1976) (Stewart, J., concurring)), for a consent given by a person who is in his home is a far different thing than one given by a person who is standing beside a highway. The officers seeking to obtain the consent are already intruding on

[4]Absent a proper consent, in all but a few carefully defined situations, a warrantless search of a person's home is unreasonable. *Camara v. Municipal Court,* 387 U.S. 523, 528 - 29 (1967).

a normally private area and their "request" to search is both less resistable and, seemingly, less of a concession.

The consent to search obtained by Officer Neie cannot, when one views the totality of the circumstances surrounding it, be deemed voluntary. The officers whose entry and search of apartment 213 were consented to had already intruded upon an area not open to the public by following a person who had a building key into the building. They had no permission to enter that building or to approach the door to apartment 213.

The officers were on their way into apartment 213 when Howard consented to their entry, because "they was in the doorway and were coming in anyways . . . . So I had no way to stop them" (C.T. 25). They did not tell Howard that he had a right to refuse to consent to a search and, by their conduct, indicated that he could not.

When one views the totality of the circumstances and considers the behavior of the officers, only one conclusion can be reached: that the consent to search given by appellant Howard was not voluntary and that the ensuing search of apartment 213 was unlawful.

CONCLUSION

It is submitted that this case presents substantial questions regarding due process and the right to privacy. The questions presented here merit a full review before this Court.

Respectfully submitted,

BURTON MARKS and

STEPHEN GILBERT

Attorneys for Appellant

INDEX TO APPENDIXES

APPENDIX "A"

OPINION OF THE COURT OF APPEAL
SECOND APPELLATE DISTRICT
STATE OF CALIFORNIA

CERTIFIED FOR PUBLICATION

In the Court of Appeal of the State of California, Second Appellate District, Division Three.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. KENNETH LEROY HOWARD, Defendant and Appellant.

2D CRIM. NO. 28221 - Sup. Ct. No. A-316527

[FILED OCTOBER 29, 1976]

ON REHEARING APPEAL from a Judgment of the Superior Court of Los Angeles County. Sam Bubrick, Judge. Affirmed.

Burton Marks and Jonathan K. Golden for Defendant and Appellant.

Evelle J. Younger, Attorney General, Jack R. Winkler, Chief Assistant Attorney General, S. Clark Moore, Assistant Attorney General, Howard J. Schwab and Alexander W. Kirkpatrick, Deputy Attorneys General, for Plaintiff and Respondent.

Kenneth Leroy Howard appeals from a judgment of conviction of possession of a concealable firearm by a

convicted felon. (Pen. Code, § 12021.) The appeal lies. (Pen. Code, § 1237, subd. (1).)

Appellant Howard contends that: (1) the police violated his constitutional rights when they illegally entered his apartment building through a locked security entrance; (2) they searched his apartment without his consent; and (3) they seized the guns they found in his apartment unconstitutionally. Each of these contentions is without merit.

Appellant's remaining arguments concern Penal Code section 12021. He urges that the section requires knowledge on the part of the convicted felon of his status and of the prohibition against possession of a firearm and that no proof of such knowledge was introduced at his trial. Alternatively, appellant argues that Penal Code section 12021 is unconstitutional if it is interpreted not to require such knowledge on the part of a defendant-felon. Both of these arguments also lack merit. We will therefore affirm the judgment of conviction.

STATEMENT OF FACTS[1]

On the afternoon of March 17, 1975, Los Angeles police officers went to an apartment building on Kingsley Avenue to investigate tips received from two informers that a black male by the name of Howard was selling heroin and using a certain apartment as a "shooting gallery."

Admission to the hallways of this building could be gained only through a locked door opened by key or buzzer

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[1]We construe all facts in the light most favorable to the People as the prevailing party below. (*People v. Vann*, 12 Cal. 3d 220, 225.)

activated by someone in an apartment. The officers did not use a key or seek a buzzer signal from any occupant. Instead, they simply entered the building at the same time someone else opened the door thereof. One of the officers, however, testified that the managers of many security buildings in the area, including appellant's building, had given the police keys to the outside doors.

The officers went immediately to appellant's apartment, identified themselves and their purpose, and asked to come inside. Appellant replied, "Come on in." Once inside, the officers asked for and received appellant's permission to search the apartment.

The search revealed marijuana, a rifle, and a Colt revolver. All of these items were seized. One of the officers testified that although he had no particular suspicion that the guns were stolen, it had been his experience in narcotics investigations that guns discovered in the course of such investigations frequently turned out to have been stolen.

Testifying in his own defense, appellant stated that he had not given permission to the police to search the apartment. He also stated that while police were interrogating him, his girl friend entered the apartment and told police that she owned the marijuana. Appellant admitted that he was the registered owner of both firearms, but claimed to have no knowledge that they were at the Kingsley apartment. He had purchased them before he was arrested and convicted of a felony and said he had no knowledge that he was thereafter prohibited from owning them.

DISCUSSION

I Appellant's Constitutional Rights Were Not Violated By Police Entry Through The Outside Apartment Security Entrance.

In *People v. Seals,* 263 Cal. App. 2d 575, 577, this statewide court held that officers can constitutionally enter apartment hallways and other common areas without a warrant or express permission from particular tenants. In the present case, however, officers gained entry to the hallway through a locked door. Appellant argues that in doing so the police committed a trespass in violation of his constitutional rights of privacy and freedom from unreasonable search and seizure.

For several reasons, however, we are convinced that under the facts of this case no constitutional violations occurred. First, one of the officers testified that the building's manager had given him a key to the outside door. Even though the key was not used on this particular occasion, its possession by the officers was unrebutted evidence that the police had the manager's permission to enter in the course of their duties. Appellant cannot presume to control the right of other tenants, or particularly the manager as the owner's agent, to authorize entry to the building's common areas by nontenants. (See *People v. Cruz,* 61 Cal.2d 861, 866-867; *People v. Egan,* 250 Cal. App. 2d 433, 436; *cf. People v. Baker,* 12 Cal. App. 3d 826, 836.)

Second, we do not believe that the locked outside door established the same sanctity for the hallways and common areas as is established for individual apartments by the doors

to those apartments. An outside security door is designed to prevent persons roaming through the apartment buildings for solicitation or perhaps criminal purposes. But no constitutional infringement of privacy occurs when an officer enters a building through the outside security door and goes immediately to an apartment where he has business with a particular tenant. (*United States v. St. Clair* (S.D. N.Y. 1965) 240 F.Supp. 338, 340.)[2] Even the tenant to be visited can easily avoid the visitor by not answering the door.

Finally, we note that even if the initial entry by the officers were trespassory, it would not invalidate the subsequent search of appellant's apartment because, as we will discuss below, consent therefor was freely given by appellant. His opportunity to make an intelligent decision as to whether he would consent to the search was in no way impaired by the fact that the officers first made contact with him by knocking on his apartment door rather than by buzzing him at the outside entrance. (*Cf. People v. Haven,* 59 Cal. 2d 713, 718 (sudden confrontation by officers who had illegally entered defendant's house vitiated consent to search); *People v. Lawler,* 9 Cal. 3d 156, 164 (consent obtained following illegal search held invalid).) A simple trespass alone will not invalidate a subsequent search which is otherwise proper. (*People v. Terry, supra,* 70 Cal. 2d at 427; *People v. Medina,*

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[2]The *St. Clair* case involved precisely the type of apartment security entrance involved in the instant case. Although apparently no California case has dealt with the identical question, our Supreme Court has cited the *St. Clair* decision for the general proposition that police officers may constitutionally enter common hallways of apartment buildings without a warrant or express permission. (See *People v. Terry,* 70 Cal. 2d 410, 427.) For a thorough discussion of other federal and state court decisions in conformity with *St. Clair,* see *People v. Seals, supra,* 263 Cal. App. 2d at 578 - 579.)

26 Cal. App. 3d 809, 817; *People v. Seals, supra,* 263 Cal. App. 2d at 579.)

II. Substantial Evidence Supports The Conclusion That Appellant Consented To The Search Of His Apartment.

Testimony of the police officer regarding appellant's consent to search was unequivocal. Even defendant's own testimony can be interpreted an indicative of consent.[3] As an appellate court, we are bound by this determination since it is supported by substantial evidence. (*People v. West,* 3 Cal. 3d 595, 602; *People v. Smith,* 63 Cal. 2d 779, 798, *cert. den.* 388 U.S. 913 [18 L.Ed.2d 1353]; *People v. Brown,* 19 Cal. App. 3d 1013, 1018.)

III. Seizure Of The Guns Was Constitutional.

An officer may constitutionally search for instruments or fruits of a crime, contraband or evidence of criminal activity. (*Warden v. Hayden* (1967) 387 U.S. 294, 310 [18 L.Ed.2d 782, 793-794].) Appellant urges this court to require that an officer engaged in a search have probable cause (i.e., specific articulable facts) to believe that items he uncovers are such evidence or instrumentalities before they

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3 "Q. [by Prosecutor]: Did I understand you correctly that you may have said 'You might as well search' at some point?
"A. [by Appellant]: At the time they was coming in, and the investigation, I have no way of stopping them from searching.
"Q. So you said, 'You might as well search'?
"A. I did make that statement.
"Q. That was after the officers asked you if they could search?
"A. No. They was -- Yeah, I guess so."

can be seized.

We choose not to impose that requirement. Appellant's argument puts the cart before the horse. It would demand that an investigating officer know in advance and with substantial certainty which items will be of evidentiary use at trial. This creates a severe and illogical burden. The primary invasion of privacy occurs in the search itself. Seizure of items, subject to an accounting and eventual return to their owner, is not a new and independent infringement of constitutional rights which would justify the separate high standard of probable cause suggested by appellant. (See *Warden v. Hayden, supra,* 387 U.S. at 309-310 [18 L.Ed.2d at 793].)

We therefore hold that before an item discovered in the course of a lawful search can be seized, an officer needs only a reasonable belief that the item may be evidence of the commission of a crime. (See *People v. Teale,* 70 Cal. 2d 497, 511.) In the instant case, the officer's investigative experience in narcotics cases made reasonable his seizure of the firearms.

IV. Penal Code Section 12021 Does Not Require Knowledge On The Part Of The Convicted Felon And, As So Interpreted, Is Not Unconstitutional.

Appellant's final contention is twofold. First, he argues that no evidence was introduced at trial that he was aware of the prohibition Penal Code section 12021[4]

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4 Penal Code section 12021 states in pertinent part:
"(a) Any person who has been convicted of a felony under the laws of the United States, of the State of California, or any other state, government, or county, . . . who owns or has in his possession or under his custody or

placed upon him as a felon. Alternatively he asserts that if he could be convicted under this section without proof of knowledge of the prohibition or his status as a convicted felon, then he was denied due process of law.

In *People v. Mendoza*, 251 Cal. App. 2d 835, this statewide court held that under this section neither intent nor knowledge is an element of the offense. "The only knowledge required is knowledge of the character of the object possessed; knowledge that the possession is illegal is unnecessary." (*Id.* at 843.) Therefore, the fact that appellant claims that he had no knowledge of the prohibition is irrelevant.

This interpretation of the statute is constitutional. In *Lambert v. California* (1957) 355 U.S. 225 [2 L.Ed.2d 228], the United States Supreme Court held that an ordinance which made it unlawful for any convicted person to remain in Los Angeles for more than five days was unconstitutional. The Court emphasized that the *Lambert* ordinance penalized the mere act of existing. No activity was required to violate the statute. (*Id.* at 229 [2 L.Ed.2d at 232].)

The California Supreme Court, in determining the constitutionality of a gun registration law, noted that mere existence was not penalized. Rather, as in the present case, the penalty was imposed upon possession. (*Galvan v. Superior Court*, 70 Cal. 2d 851, 868.) "Except under the unique circumstances of *Lambert*, knowledge of the law is not a requirement of due process." (*Id.*) A defendant must have knowledge of the character of the object possessed; he or she need not

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4 (cont'd)

control any pistol, revolver, or other firearm capable of being concealed upon the person is guilty of a public offense. . . . "

have knowledge that the possession is illegal. (*People v. Mendoza, supra*, 251 Cal. App. 2d at 843.) Therefore, the statute as interpreted is not unconstitutional.

Additionally, appellant asserts that he had no knowledge of his status as a convicted felon and relies on *People v. Bray*, 52 Cal. App. 3d 494. That case, however, is distinguishable from the present case. In *Bray*, the court held that because the defendant was ignorant of the facts necessary to come within the statutory prohibition of section 12021, instructions on mistake or ignorance of fact should have been given. The court indicated that no one was sure of the defendant's status and clearly limited the holding to the unique facts of the case. (*Id.* at 499.) In the present case, the record shows that similar ignorance of or confusion in regard to the facts which would warrant such a defense did not exist. No true issue of knowledge was presented since appellant admitted that he had been convicted of a felony.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

COBEY, Acting P.J.

We concur:

ALLPORT, J.

POTTER, J.

APPENDIX "B"

DENIAL OF HEARING
CALIFORNIA SUPREME COURT

CLERK'S OFFICE, SUPREME COURT
4250 State Building

San Francisco, California 94102

DEC 22 1976

I have this day filed Order

HEARING DENIED

In re: 2 Crim. No. 28221

People

vs.

Howard

Respectfully,

G. E. BISHEL
Clerk

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on MARCH 17, 1977, I served the within JURISDICTIONAL STATEMENT (Howard vs. People of the State of California) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

Clerk, County of Los Angeles [1 copy]
111 North Hill Street
Los Angeles, California 90012
For: Honorable Sam Bubrick, Judge - Superior Court
No. A-316527

District Attorney, County of Los Angeles [1 copy]
849 South Broadway
Los Angeles, California 90012

Attorney General, State of California [2 copies]
3580 Wilshire Boulevard
Los Angeles, California 90010
For: Jack R. Winkler, Chief Assistant Attorney General,
S. Clark Moore, Assistant Attorney General,
Howard J. Schwab and Alexander W. Kirkpatrick,
Deputy Attorneys General

I declare under penalty of perjury that the foregoing is true and correct.

Executed on MARCH 17, 1977, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648
(714) 536-7161